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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN IRWIN,

Defendant and Appellant.

A141555

(City & County of San Francisco
Super. Ct. No. SCN219590)

Defendant Brian Irwin was convicted by a jury of misdemeanor resisting, obstructing, or delaying a peace officer (Pen. Code, § 148, subd. (a)(1)) during unrest in San Francisco after the Giants won the World Series on the night of October 28, 2012. The jury acquitted him of arson (Pen. Code, § 451, subd. (d)), misdemeanor battery of a police officer (Pen. Code, § 243, subd. (b)), and lesser included offenses. Irwin contends that his conviction must be reversed because it was not supported by substantial evidence, and the court failed to give a required jury instruction. He also asks us to review for error the sealed record on his motion for discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We conclude that Irwin's arguments lack merit, and that there was no possible prejudice in connection with the *Pitchess* motion. Accordingly, we affirm the judgment.

I. BACKGROUND

Irwin was charged with arson for setting fire to debris from a dumpster, with resisting arrest for running away from an officer who was ordering him to stop, and with battery of an officer for spitting in the officer's face when he was arrested.

In the early morning hours of October 29, 2012, Police Sergeant Frank Harrell was summoned to what he and Officer Brendan Caraway, a member of his squad, described as a “chaotic” scene at AT&T Park at Third and King Streets after the Giants’ victory. Caraway testified: “There were thousands of people. Everybody was drinking. There was a bonfire set in the street. They were fighting, throwing bottles, climbing the street signs, climbing the cable cars, urinating in public, fighting. It was a riot.” Harrell testified that Irwin was among those fueling the bonfire. Harrell formed a “skirmish line” of officers in riot gear to march up Third Street and disperse the crowd.

Caraway said that while most of the crowd ran away as the police line advanced, Irwin walked back and forth in front of them, gesturing with his middle fingers, and saying, “Fuck the police.” Harrell saw Irwin get down on his knees with something in his hands, and Irwin ran away on Third when Harrell approached him. Some of the officers teased Harrell that he was too old to catch Irwin. Harrell told the officers that Irwin was an “impact player” who incites others to vandalism and violence “and that he will be arrested.”

As the police line marched up Third Street, Caraway saw Irwin and others pushing over trash cans. Caraway said that Irwin knelt down next to three of the cans, and when he stood up their contents were on fire. Caraway was on one side of the line 100 feet from Irwin and the cans. He did not see what Irwin did with his hands before their contents began burning.

At the intersection of Third and Howard, the police encountered a large dumpster tipped over in the middle of the street, with its contents spilled out in their direction. Harrell testified that he saw Irwin and others roll the dumpster into the street. He saw Irwin step into the dumpster, and “make a motion as if with some type of flammable lighter and light the debris that was inside the debris box.” He did not see what Irwin had in his hand, but “saw a flame emit from the top area of his right hand.” He then observed Irwin attempting to fan the smoldering debris with a cardboard object. However, when Harrell was interviewed by a police department investigator, he said he did not see Irwin light any fires that night.

Caraway testified that he saw Irwin on top of the dumpster with a piece of cardboard or wood, fanning smoke from the debris into a fire. Officer Matthew Ortega was in the center of the police line and the officer who arrested Irwin. He did not mention Irwin being on top of the dumpster in his report of the incident or when he was interviewed about it. Ortega testified that he saw Irwin leaning over the dumpster with his head down, and fire erupting from the debris shortly thereafter. Ortega said that Irwin was the only one “directly next” to the dumpster when the fire broke out. He saw Irwin with something in his hands, but it was not a piece of cardboard or wood.

Harrell ordered officers to apprehend Irwin. Irwin looked up, saw the police charging at him, and ran away through Yerba Buena Gardens, chased by five or six officers, including Ortega and Caraway, who were telling him to stop. Ortega was closest to Irwin during the chase. He testified: “I told him to stop, especially at the beginning, towards the beginning of the pursuit, I ordered him to stop. As we turned into Yerba Buena Gardens, I told him to stop. He continued to run.”

Ortega testified that Irwin wound his way through Yerba Buena Gardens and reached Mission Street, where Ortega saw him jump a shoulder-height hedge along the street’s median. When Ortega caught up with him, Irwin was “face down along the curb between the bushes and curb . . . without trying to move.” As Ortega was attempting to handcuff Irwin, Caraway arrived to assist. After they handcuffed Irwin and turned him to sit up, Irwin spat in Caraway’s face. When Ortega sat Irwin up, he noticed blood on the side of Irwin’s face.

Caraway testified that Ortega was struggling to control Irwin’s hands when he caught up to them. Irwin appeared to have hit his head on the curb. There was blood on the curb, Irwin’s head was bleeding profusely, and blood was pooling in his nose and on his mouth. Caraway knelt on Irwin and reached for his hands. Irwin “took like a deep breath and exhaled rapidly, shooting blood and snot and everything else out of his nose” under Caraway’s face mask and into his face and eyes.

Irwin had a backpack with him, and police found no lighter or matches inside it. Ortega did not see Irwin throw or hide anything during the chase, and found no lighter or

matches when he retraced the route Irwin had taken. Ortega and Caraway both saw Irwin taunt them earlier that night, and they recognized him later by his face and the hooded sweatshirt he was wearing. Neither Ortega nor Caraway remembered prominent blue lettering on the sweatshirt. When Ortega spoke with Irwin in an ambulance at the scene, Irwin said, “What was I lighting on fire?” Ortega testified that he did not tell Irwin why he was being arrested, but he was not with Irwin the entire time between the arrest and their conversation in the ambulance.

Irwin’s friend Kasey Kruger testified for the defense that she, Irwin, and other roommates came into San Francisco the night of October 28 for the Giants celebration. They spent a couple of hours outside the stadium, and then walked toward Market Street along Third. She said Irwin did not throw anything in the bonfire at Third and King. A member of their group, along with many others at the scene, yelled at the police line, but Irwin did not say “fuck you” to the police or flip them off. Kruger did not see Irwin knock over any trash cans on Third Street, but he danced on top of a smoking dumpster that was in the middle of the road facing the stadium. While Irwin was dancing on the dumpster, Kruger heard someone say “run.” She turned and saw that the police had broken their line and were charging toward her. She ran in the other direction, and did not see Irwin again that night.

Kathy Pezdek, a professor of cognitive science at Claremont Graduate University, testified for Irwin about factors affecting eyewitness memory and identification. The factors in this case included: (1) “lighting and distance”—memory is better when you observe a person under adequate lighting from up close; (2) “distraction” — memories are less reliable when multiple people and events are involved; (3) “cross-race effect”—people are more accurate identifying people of their own race or ethnicity, an effect that extends to Latinos and Whites; and (4) “clothing bias”—innocent persons are more likely to be identified as perpetrators when they are wearing the same clothing. Pezdek also testified that studies showed police were no more reliable than others as eyewitnesses.

Irwin’s closing arguments against the arson charge noted inconsistencies in the officers’ statements, in particular about what they observed at the dumpster. With respect

to battery of an officer, defense counsel argued that Irwin reflexively expelled blood and mucus onto Caraway because he was handcuffed and had no other way to keep from choking. With respect to resisting arrest, counsel argued there was “no evidence to prove that Brian actually heard them saying stop or you’re under arrest, if they even said that at all. [¶] . . . [¶] He’s not guilty of willfully resisting Officer Ortega by running. He was complying with what the police wanted, which was to get everyone off the street. Now, it’s a reasonable inference that Brian had no idea that they were coming after him for anything, that they just wanted everyone off the street.”

II. DISCUSSION

A. Substantial Evidence

Irwin contends that his conviction for resisting arrest was not supported by substantial evidence. As we have said, the conviction was based on Irwin’s flight from Officer Ortega. The court instructed the jury: “You must . . . not find Mr. Irwin guilty of resisting, obstructing or delaying a peace officer in Count 3 unless you all agree that the People have proved specifically that Mr. Irwin committed the offense by running away from Matthew Ortega. Evidence that Mr. Irwin may have committed the alleged offense in another manner, for example, not cooperating while being handcuffed is not sufficient for you to find him guilty of the offense charged.” Irwin argues that the evidence “failed to establish that [he] had knowledge the officer was trying to arrest him or was requiring him to stop,” and because the police had no lawful ground to arrest him. To address these arguments, we “must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Substantial evidence supported a finding that Irwin knew Ortega was trying to arrest him or requiring him to stop. Irwin writes: “Although Caraway and Ortega testified that it was their *intent* in charging the crowd to go arrest appellant, there was no evidence that the officers gave any indication to anyone in the crowd by the dumpster,

that appellant was their focused target. Rather, the fact that everyone fled the area as the officers charged provided evidence that appellant's running from the scene was consistent with a belief—apparently held by all those near the dumpster—that he was following the officers' prior directive to leave the area. [¶] While Ortega testified that he told appellant to stop twice as he was running, and Caraway said officers gave appellant 'lawful orders to stop,' there was no evidence how loudly the orders were given, how far away appellant was at the time the orders were given, or that the officers saw that appellant turned or gave any indication that he heard their orders. Nor was there evidence that the 'orders' to stop were specific enough that appellant would have reasonably understood them to be directed at him, even if he did hear them."

We disagree. Ortega testified that he told Irwin to stop, "*especially* at the beginning, toward the beginning of the pursuit, I ordered him to stop. As we turned into Yerba Buena Gardens, I told him to stop." (Italics added.) The jury could find from this testimony that Ortega gave Irwin more than two orders to stop. The jury could also reasonably find that Irwin heard the orders. Ortega stayed close enough to Irwin to track his flight, which Ortega described as follows: "So he began running northbound Third Street and turned left, which is west into the Moscone Center, Yerba Buena Gardens. He ran up a long corridor. He turned right. He turned left and right again, which led him to Mission Street." Ortega said he was approximately 15 yards behind Irwin when he saw Irwin leap over the hedges on Mission. The jury could infer from this testimony that Irwin was within earshot of Ortega throughout the pursuit. The jury could also find that Irwin must have known that he was the officers' "focused target." If they were merely ordering him to disperse along with the rest of the crowd, they would have had no reason to pursue him individually through Yerba Buena Gardens. Irwin's trial counsel argued that, when he ran, Irwin was merely complying "with what the police wanted, which was to get everyone off the street." The jury reasonably rejected that contention.

Irwin maintains that the police acted unlawfully when they chased him because they had no probable cause to arrest him. However, the officers testified that they saw Irwin set the dumpster on fire and fan the flames. Probable cause for an arrest "exists

when facts known to the arresting officer would persuade someone of ‘reasonable caution’ that the person to be arrested has committed a crime.” (*People v. Celis* (2004) 33 Cal.4th 667, 673.) Although the jury acquitted Irwin of arson, the officers’ testimony adequately supported a finding that Ortega had reasonable cause to believe he had committed that offense.

B. Instructional Issue

The court instructed the jury pursuant to CALJIC No. 2656: “Mr. Irwin is charged in Count 3 with resisting, obstructing or delaying a peace officer in the performance or attempted performance of his duties in violation of Section 148(a) of the Penal Code, by running away from officer Ortega. [¶] To prove that he is guilty of this crime, the People must prove that Matthew Ortega was a peace officer lawfully performing or attempting to perform his duties as a peace officer and second, that Mr. Irwin willfully resisted, obstructed or delayed the performance or attempted performance of those duties and, three, that when Mr. Irwin acted, he knew or reasonably should have known that Matthew Ortega was a peace officer performing or attempting to perform his duties. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else or gain any advantage. [¶] Any person who is employed as a police officer by the San Francisco Police Department is a peace officer.”

Irwin argues that the court erred because it also should have instructed the jury pursuant to CALJIC No. 2670 that a peace officer is not lawfully performing his duties when he unlawfully arrests someone or uses unreasonable or excessive force when making an otherwise lawful arrest. CALCRIM No. 2670 sets forth rules governing the use of force, and explains that an arrest must be based on an arrest warrant or probable cause, which “exists when the facts known to the arresting officer at the time of the arrest would persuade someone of reasonable caution that the person to be arrested has committed a crime.” The court has a sua sponte duty to give this instruction “if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense.” (Bench Notes to CALJIC No. 2670

(Fall 2015 Ed.) p. 585.) Irwin contends that the instruction was required here because the evidence supported a finding that Ortega lacked probable cause to arrest him.

When instructions were discussed during trial, the court tentatively declined Irwin's request to give CALCRIM No. 2670. The court observed that the defense theory was that the police arrested the wrong person, not that they used excessive force. The court stated: "I'm going to leave this open. . . . But . . . if there is an issue that comes up in the defense case where there's some evidence that's unlawful detention or arrest, not a mistake. Like *there's no probable cause*, then I will give . . . 2670" (Italics added.)

The subject was discussed again after the defense rested. Defense counsel said he had "thought again about the evidence that has been presented." Although he had advised the court that unlawful use of force would not be a defense theory, he argued that an unlawful performance of duty instruction was required in connection with the battery of an officer charge. The court stated, "Now you're asking me to give the instruction. I'm not going to give the instruction or I'm going to let the People re-open." Counsel replied, "I made my objection on the record."

During a break in the closing arguments, the court said it did not give an unlawful use of force instruction in connection with the resisting arrest charge in part "because the act itself is running away from Officer Ortega, and the injury . . . to Mr. Irwin occurred basically at the end of that act." Counsel replied, "Right, but I also am asking for it with regard to the 243 (b) [battery charge], seems to be much closer in time." The court responded, "I understand that, but there's no evidence to support it, and . . . the law does not allow me to give it unless there's substantial evidence to support the instruction."

It is apparent from the record that neither the trial court nor defense counsel doubted that Ortega had probable cause to arrest Irwin for arson, and neither do we. Although Ortega's observations differed in some details from those of Harrell and Caraway, he testified that he saw debris catch fire shortly after Irwin leaned over the dumpster. Irwin had some sort of object in his hand, and was the only one next to the dumpster when the fire started. Ortega said that as soon as the fire broke out, a sergeant ordered Irwin's arrest. Echoing portions of his trial counsel's closing argument, Irwin

speculates that Harrell gave the order because of Irwin's earlier insulting behavior toward the police, which he submits was not illegal. But any question as to Harrell's motives did not cast any significant doubt on the reasonableness of Ortega's belief that Irwin had started a fire.

The prosecutor told the jury: "With regard to the defense argument essentially that the People have to prove Brian, again, ran because he committed a crime, that's not in the elements. It's just that he obstructed, resisted or delayed an officer in the performance of his duties and that he knew he was an officer when he was doing those things. It doesn't say you have to be running after having committed a crime. That was not an element." Irwin "submits that the People's explanation may have confused the jury about the standard it was to apply, leaving it to infer that it was required to convict appellant of violating Penal Code section 148, subdivision (a) simply because Ortega chased him, while he was on duty as a police officer." However, the prosecutor was correct to point out that Irwin could be convicted of resisting arrest even if he did not commit arson. The jury was instructed it had to find that Ortega was "lawfully performing or attempting to perform his duties as a peace officer" when he chased Irwin. No substantial evidence supported a finding that the chase was unlawful because Ortega did not reasonably believe that Irwin had committed arson. The jury's not guilty verdict on that charge does not change this conclusion.

C. Pitchess Motion

Irwin made a *Pitchess* motion for discovery of records of misconduct by Officers Ortega and Caraway maintained by the San Francisco Police Department or Office of Citizens Complaints. Irwin and the Police Department stipulated that any information about dishonesty, fabrication of evidence, or excessive force on the part of Ortega and Caraway would be furnished to the court for in camera review, and that the defense would be provided any information the court ordered to be disclosed. Irwin asks us to review the in camera proceeding for reversible error. We have done so, and conclude that any possible error in connection with the *Pitchess* motion was harmless under any standard. (*People v. Cook* (2006) 39 Cal.4th 566, 616.)

III. DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuiness, P.J.

Jenkins, J.

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